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EIGHTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

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Addendum

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III. PART THREE - STATUTE OF AN INTERNATIONAL CRIMINAL COURT

A. Introductory remarks

1. This addendum constitutes part III of the eighth report of the Special Rapporteur (A/CN.4/430).

2. This part III of the report is a response to the approach taken by the Commission at the time of its provisional adoption of draft article 4 concerning the obligation to try or extradite. Paragraph 3 of that article states that the provisions of paragraphs 1 and 2 of the article do not prejudge the establishment and the jurisdiction of an international criminal court. Furthermore, paragraph 5 of the relevant commentary indicates that draft article 4, paragraph 3, deals with the possible establishment of an international criminal court and shows that the jurisdictional solution adopted in the draft article would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court. 22/

3. In addition, this part III is a response to paragraph 2 of General Assembly resolutions 43/164 and 44/32, of 9 December 1988 and 4 December 1989, respectively, concerning the Draft Code of Crimes against the Peace and Security of Mankind. In paragraph 2 of these resolutions, the General Assembly notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft Code, and encourages the Commission to explore further all possible alternatives on the question.

4. Being of a preliminary nature, this part III is rather in the nature of a questionnaire-report. Its purpose is to offer the Commission some possible choices among the various solutions and to elicit responses. These choices deal mainly with the following points:

(1) Competence of the Court:

(a) Jurisdiction limited to crimes mentioned in the Code or jurisdiction as to all international crimes?

(b) Necessity or non-necessity of the agreement of other States

(2) Procedure for appointing judges

(3) Submission of cases to the Court

22/ For the text of draft article 4 and the relevant commentary, see the Report of the International Law Commission on the work of its fortieth session, Official Records of the General Assembly, Forty-third Session, Supplement No. 10 (A/43/10), para. 280.

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(4) Functions of the prosecuting attorney

(5) Pre-trial examination

(6) Authority of res judicata by a court of a State

(7) Authority of res judicata by the Court

(8) Withdrawal of complaints

(9) Penalties

(10) Financial provisions.

B. Statute

1. Competence of the Court

(a) Jurisdiction limited to the crimes mentioned in the Code or jurisdiction as to all international crimes?

(i) Versions submitted

5. On this topic, the Special Rapporteur submits the following versions:

Version A: There is established an International Criminal Court to try natural persons accused of crimes referred to in the draft Code of crimes against the peace and security of mankind.

Version B: There is established an International Criminal Court to try natural persons accused of crimes referred to in the draft Code of crimes against the peace and security of mankind, or other offences defined as crimes by the other international instruments in force.

(ii) Commentary

6. The question is whether international criminal jurisdiction will be limited to the crimes referred to in the draft Code of crimes against the peace and security of mankind, or whether it will also encompass other international crimes which do not fall within that category. As is well known, the Code does not cover all international crimes. Among those not mentioned therein are the dissemination of false or distorted news, or false documents, by persons knowing that they will have an adverse effect on international relations; insults to a foreign State; the counterfeiting of currency, practised by one State to the detriment of another State, and the theft of national or archaeological treasures; the destruction of submarine cables; international trafficking in obscene publications, etc.

7. Accordingly, the concept of an international crime is broader than that of a crime against the peace and security of mankind; it covers a wider field which

includes all other international crimes in addition to those defined in the draft Code.

8. The question, therefore, is whether the jurisdiction of the Court is limited to crimes against the peace and security of mankind, or whether the Court will deal with all international crimes.

9. It would seem preferable to confer the broadest possible jurisdiction upon the Court; otherwise, it would be necessary to establish two international criminal jurisdictions, which would lead to complications.

(b) Necessity or non-necessity of the agreement of other States

(i) Versions submitted

10. On this topic, the Special Rapporteur submits the following versions:

Version A: No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State in which the crime was committed, or by the State of which such person is a national, or by the State against which the crime was directed, or of which the victims were nationals.

Version B: Any State may bring before the Court a complaint against a person if the crime of which he is accused was committed in that State, or if it was directed against that State, or if the victims are nationals of that State. If one of the said States disagrees as to the jurisdiction of the Court, the Court shall resolve the issue.

(ii) Commentary

11. Version A is based on article 27 of the draft statute prepared by the 1953 Committee on International Criminal Jurisdiction. 23/ Is it appropriate? From the legal point of view, nothing prohibits a State from punishing crimes against its own security, even if such crimes are committed abroad by foreigners. Moreover, in the vast majority of cases, this solution would lead to requesting the consent of Governments guilty of having organized or tolerated criminal acts.

2. Procedure for appointing judges

(a) Versions submitted

12. On this topic, the Special Rapporteur submits the following versions:

23/ See "Report of the 1953 Committee on International Criminal Jurisdiction", Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645), annex, article 27.

Version A: The judges shall be elected by the General Assembly of the United Nations, by an absolute majority of those present and voting, when convened by the Secretary-General of the United Nations.

Version B: The judges shall be elected by representatives of the States parties to the statute of the Court, by an absolute majority of the States present and voting.

(b) Commentary

13. Version B is based on the text submitted by the 1953 Committee on International Criminal Jurisdiction. 24/ However, this small college seems to be out of keeping with the nature of crimes against the peace and security of mankind which concern the international community as a whole. It should also be noted that there is a contradiction in article 11, which entrusts the election to a small body while at the same time assigning to the Secretary-General the task of convening the meetings for this election.

3. Submission of cases to the Court

(a) Versions submitted

14. On this topic, the Special Rapporteur submits the following versions:

Version A: Cases may be brought before the Court by any State Member of the United Nations.

Version B: Cases may be brought before the Court by any State party to this statute.

Version C: Cases may be brought before the Court by any State Member of the United Nations subject to the agreement of the United Nations organ specified in the statute of the Court.

(b) Commentary

15. Should the organ referred to in version C be the General Assembly or the Security Council? In the opinion of some, it should be the General Assembly: as a matter of fact, abuse of the veto in the Security Council could paralyse the Court. On the other hand, the General Assembly, by an absolute majority or a qualified, two-thirds majority, could provide a guarantee against improper complaints as well as abuse of the veto.

24/ Ibid., article 11.

4. Functions of the prosecuting attorney

(a) Versions submitted

16. On this topic, the Special Rapporteur submits the following versions:

Version A: A jurisconsult appointed by the complainant shall assume the functions of prosecuting attorney. He shall draw up the indictment and shall be responsible for conducting the prosecution if the case is committed for trial before the full Court.

Version B: A prosecuting attorney-general assigned to the criminal court shall assume the functions of conducting the prosecution if the case is committed for trial before the full Court.

(b) Commentary

17. Version A is the solution proposed by the 1953 Committee. 25/ It is simple but does not differentiate sufficiently between the interests of a State and those of the international community. The functions of prosecuting attorney call for a degree of specialization and technical expertise which a person appointed for a given occasion may not necessarily have for upholding the interests of a State. There is a risk of confusing the prosecuting attorney with the Agent of a State.

5. Pre-trial examination

(a) Version submitted

18. On this topic, the Special Rapporteur submits the following version:

A committing chamber, composed of a number of members of the judiciary to be determined by the statute of the Court, shall be responsible for the pre-trial examination. The members of this Chamber shall be appointed for the term of office of the Court. Their appointment shall not be immediately renewable.

The committing chamber may order any preparatory inquiries or security measures that it deems necessary, such as summoning witnesses, issuing summonses, warrants of commitment and arrest warrants, appointing commissions of inquiry, issuing letters rogatory and requests for extradition and, if need be, requesting the co-operation of States.

6. Authority of res judicata by a court of a State

(a) Versions submitted

19. On this topic, the Special Rapporteur submits the following versions:

25/ Ibid., article 34.

Version A: The Court cannot try and punish a crime on which a final judgement in criminal law has been handed down by the court of a State.

Version B: The Court can try and punish a crime on which the court of a State has handed down a judgement, if the State in whose territory the crime was committed, or the State against which the crime was directed, or the State whose nationals were the victims, has grounds for believing that the judgement handed down by that State is not based on a proper appraisal of the law or the acts.

(b) Commentary

20. The first version expresses a strict application of the non bis in idem rule.

21. However, there appeared to be some possible drawbacks to this principle. It seemed preferable to avoid reverting to certain precedents whereby defendants were shown a certain amount of leniency. That is the reason for version B.

7. Authority of res judicata by the Court

(a) Version submitted

22. On this topic, the Special Rapporteur submits the following version:

No court of a State party to this Statute may hear a case which has already been referred to the Court.

(b) Commentary

23. This is the simplest and clearest solution. It avoids conflicts of jurisdiction between the Court and national courts and, at the same time, enhances the authority of the Court.

8. Withdrawal of complaints

(a) Versions submitted

24. On this topic, the Special Rapporteur submits the following versions:

Version A: If a complaint is withdrawn, the proceedings shall be discontinued ipso facto, so that criminal proceedings may be instituted before the Court, unless they are re-opened by another State having the authority to do so.

Version B: Withdrawal of a complaint does not mean, ipso facto, that the proceedings shall be discontinued. The proceedings must continue until such time as the case is dismissed or there is a conviction or acquittal.

(b) Commentary

25. Version A favours the principle that the proceedings should be discontinued, provided no objection is raised by other States entitled to be heard by the Court in some capacity, particularly as complainant or civil party.

26. Version B is based on the principle that prosecution for crimes against the peace and security of mankind should not be interrupted solely at the behest of the States directly concerned. Such crimes are of concern to the whole international community. There is a real danger that negotiations or arrangements may interrupt the prosecution of acts which, if particularly serious, transcend the subjective interests of the parties.

9. Penalties

(a) Versions submitted

27. On this topic, the Special Rapporteur submits the following versions:

Version A: The Court shall sentence defendants found guilty to whatever penalty it deems fair.

Version B: With the exception of the death penalty, the Court shall sentence defendants to whatever penalty it deems fair.

Version C: The Court shall sentence defendants found guilty to life imprisonment or prison terms, with or without the addition of fines and confiscation of property.

(b) Commentary

28. The first version is based on the wording of the Charter, 26/ which did not exclude the death penalty.

29. The second version excludes the death penalty. It takes into account certain developments in the criminal law of certain countries, particularly those in Western Europe.

30. The third version excludes not only the death penalty, but also other forms of corporal punishment the application of which is not unanimously accepted.

31. It should be noted that criminal penalties vary according to the times and the country, and they involve moral, philosophical or religious concepts. It therefore seems appropriate to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community.

26/ Charter of the International Military Tribunal, annexed to the London Agreement of 1945 (United Nations, Treaty Series, vol. 82, p. 279), article 27.

10. Financial provisions

(a) Versions submitted

32. On this topic, the Special Rapporteur submits the following versions:

Version A: The General Assembly shall establish a fund which shall be financed and administered in accordance with rules to be established by it. The costs of the Court and of any other entity or institution under its authority shall be paid from this fund.

Version B: The States parties to the statute of the Court and those which accede to it shall establish a fund to be financed and administered in accordance with the rules adopted by them. The costs of the Court and of any other entity or institution under its authority shall be paid from this fund.

(b) Commentary

33. Version A is based on the hypothesis that the Court is established by the General Assembly.

34. Version B is based on the narrower hypothesis that the Court is established only by the States parties to the statute.